complaints concerning such rates, terms, and conditions."[298] Thus, under section 224, if an entity provided access to poles, ducts, conduits, and rights-of-way, it had to do so on rates, terms, and conditions that were just and reasonable, but there was no specific requirement to provide access to poles, ducts, conduits and rights-of-way. Section 251(b)(4) establishes an additional requirement for LECs to provide access to poles, ducts, conduits, and rights-of-way, consistent with the requirements in section 224. Moreover, amendments to section 224(a)(1) state expressly that LECs are subject to the requirements of section 224.[299] Thus, section 251(a)(4), in conjunction with section 224, requires LECs to provide access to poles, ducts, conduits, and rights-of-way on just and reasonable rates, terms, and conditions. This requirement is vital to the development of local competition, because it ensures that competitive providers can obtain access to facilities necessary to offer service.

221. Section 703 of the 1996 Act, added and amended several provisions of section 224 of the 1934 Act. Specifically, section 703 amended sections 224(a)(1), (a)(4), (c)(1) and (c)(2)(B), and added sections 224(a)(5), (d)(3), (e), (f), (g), (h) and (i).[300] We will adopt rules implementing several of these provisions in one or more separate proceedings.[301] In this proceeding, however, we believe that we should address issues raised by new sections 224 (f) and (h), to ensure that we have an opportunity to seek comment and establish any rules necessary to implement section 251(b)(4) within the six month period established by the statute.

222. Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[302]

We seek comment as to the meaning of "nondiscriminatory access" with respect to this provision. For example, to what extent must a LEC provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers? Must those terms be the same as the carrier applies to itself or an affiliate for similar uses? Are there any legitimate bases for distinguishing conditions of access? We seek comment on specific reasons of safety, reliability, and engineering purposes, if any, upon which access could be denied consistent with

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[298] 47 U.S.C. § 224(b)(1).

[299] 1996 Act, sec. 703, § 224(a)(1).

[300] 1996 Act, sec. 703, § 224.

[301] For example, in a separate proceeding within the two-year period specified by section 224(e), we will "prescribe regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." 1996 Act, sec. 703(7), § 224(e)(1).

[302] 1996 Act, sec. 703(7), § 224(f).

sections 224(f)(1) and 251(b)(4).

223. We seek comment on specific standards under section 224(f)(2) for determining when a utility has "insufficient capacity" to permit access. Likewise, we seek comment as to the conditions under which access may be denied for "reasons of safety, reliability and generally applicable engineering purposes." For example, should we establish regulations that require a certain minimum or quantifiable threat to reliability before a utility may deny access under section 224(f)(2)? Should we establish regulations that expressly impose on utilities the burden of proving that they are justified in denying access pursuant to section 224(f)(2)? May we, and should we, establish regulations to ensure that a utility fairly and reasonably allocates capacity?

224. Section 224(h) provides that whenever "the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way," the owner must provide written notification of such action "to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. An entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible."[303]

225. We seek comment on whether we should establish requirements regarding the manner and timing of the notice that must be given under this provision to ensure that the recipient has a "reasonable opportunity" to add to or modify its attachment. In addition, we seek comment on whether to establish rules to determine the "proportionate share" of the costs to be borne by each entity, and if so, how such a determination should be made. We also seek comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. For example, if the owner of a pole modifies the pole so as to permit additional attachments, for which it can collect additional revenues, should such potential revenues offset the costs borne by the entities that already have access to the pole? We also seek comment on whether we should impose any limitations on an owner's right to modify a facility and then collect a proportionate share of the costs of such modification. For example, should we establish rules that limit owners from making unnecessary or unduly burdensome modifications or specifications?

### 5. Reciprocal Compensation for Transport and Termination of Traffic

#### a. Statutory Language

226. Section 251(b)(5) provides that each LEC has the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252(d)(2) states that, for the purpose of an incumbent LEC's compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." That subsection further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)," or to authorize the Commission or any state to "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or

[303] 1996 Act, sec. 703(7), § 224(h).

terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls." The legislative history notes that "mutual and reciprocal recovery of costs . . . may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[304] The statutory duty to establish reciprocal compensation arrangements for transport and termination furthers the pro-competitive goals of the 1996 Act by ensuring that all LECs receive reasonable compensation for transporting and terminating the traffic of competing local networks with which they are interconnected. It also furthers competition by ensuring that incumbent LECs, in particular, do not charge excessive rates for such transport and termination. As previously discussed in Section II.B.2.d.(1), we believe that the Commission is authorized to promulgate rules to guide the states in applying section 252(d).

**b. State Activity**

227. While most states have not addressed pricing for transport and termination of traffic among local competitors, a number of states have taken such actions to foster reciprocal compensation arrangements between incumbent LECs and wireline and wireless competitors. In the states that allow competition for local exchange services, there are at least three different systems in place to allow for reciprocal compensation between competing local networks, although many of these arrangements are interim pending the establishment of permanent rules. Some states have adopted mutual compensation policies with rates for termination of traffic subject to tariff regulation by the state commission.[305] Other states have required bill and keep arrangements, at least on an interim basis, such as, the Washington Utilities and Transportation Commission.[306] We discuss bill and keep arrangements in more detail below, at section II.C.5.f. Third, a number of states have directed incumbent LECs and prospective competing carriers to negotiate arrangements, but have not imposed detailed regulatory requirements with respect to those arrangements.

228. The Pennsylvania Public Utilities Commission has created an interim escrow arrangement to govern mutual compensation for termination of local calls to allow for the start-up of local exchange competition until a permanent rate can be developed. Each party makes an initial payment and then continuing monthly payments into an escrow account. After the Pennsylvania commission determines the appropriate rates for termination of local traffic, the parties will calculate the amounts owed to each party and the escrow funds will be distributed accordingly. This mechanism allows local competition to commence immediately, and gives all parties incentives to conclude the development of a permanent rate, either through negotiation or by the Pennsylvania commission.[307]

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[304] Joint Explanatory Statement at 120.

[305] For specific examples, *see CMRS Notice* at para. 71.

[306] *See Washington Utilities and Transportation Commission v. U S West*, Docket Nos. UT-941464-65, UT-950146, UT-950265, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part (Wash. Util. & Transp. Comm., Oct. 31, 1995) (adopting the bill and keep method for reciprocal compensation arrangements between incumbent LECs and new entrants as an interim measure, to be replaced later by a capacity-based charge). California (for one year), Connecticut (for eighteen months), and Oregon (for two years) are other states that have adopted a bill and keep arrangement on an interim basis. After these initial periods, the interconnecting firms will be expected to pay incumbent LECs for call termination and vice versa at a cost-based rate.

[307] NARUC Handbook at 109.

229. Illinois, Maryland and New York have established different rates for termination of a competitor's traffic, depending upon whether the traffic is terminated at the incumbent LEC's end office or at a tandem switch.[308] California and Michigan, however, have established only one rate that applies to termination of a competitor's traffic without regard to whether the call is terminated at an end office or at a tandem switch.[309]

### c. Definition of Transport and Termination of Telecommunications

230. We seek comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic. The statutory provision appears at least to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area as well as traffic passing between LECs and CMRS providers. We seek comment on whether it also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another. While the issues here overlap with those in our discussion, *supra*, of section 251(c)(2), the text of the two sections are different and thus commenters should note that the issues are not necessarily identical.[310]

231. Because section 252(d)(2) is entitled "Charges for Transport and Termination of Traffic," it could be interpreted to permit separate charges for these two components of reciprocal compensation. As discussed in the section on pricing of interconnection and unbundled network elements, economic theory dictates that dedicated facilities should be priced on a flat-rated basis.[311] We seek comment on whether we should require that states price facilities dedicated to an interconnecting carrier, such as the transport links from one carrier's switch to the meet point with an interconnecting carrier, on a flat-rated basis. We invite comment on other possible interpretations of the statutory distinction between "transport" and "termination" of traffic.

### d. Rate Levels

232. In considering the pricing policies for transport and termination of traffic, we seek comment on whether the pricing provisions in Section 252(d) should be viewed independently, or whether they should be considered together. This question arises particularly with respect to section 252(d)(1), relating to interconnection and unbundled elements, and section 252(d)(2), relating to the transport and termination of traffic.[312] Because the statute uses different language for interconnection and unbundled elements and transport and termination of traffic, each standard could be interpreted in a different way based on the different language used in each section. This would require that each incumbent LEC offering be identified as falling within one

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[308] *Id.* at 65, 74, and 81.

[309] *Id.* at 4, 77.

[310] As noted in Section II.B.2.e., we ask parties not to repeat arguments on issues they have already addressed in CC Docket No. 95-185. Instead, they should address in this docket any specific issue that is not already addressed in CC Docket No. 95-185.

[311] *See supra* Section II.B.2.d.4. We also raised the question of flat-rate charges for dedicated transport associated with exchange of traffic between carriers in the *CMRS Notice* at paras. 42-48.

[312] *See* discussion, *supra*, of section 251(c)(2) concerning the general relationship between interconnection and transport and termination of traffic.

particular category. For example, if a carrier terminates a call to one of its customers using unbundled facilities purchased from an incumbent LEC, the unbundled standard would apply. If a carrier delivers a call to the incumbent LEC for termination to a customer on the incumbent LEC's network, then the termination standard would apply.

233. In certain instances, however, transport and termination under reciprocal compensation may be difficult or impossible to distinguish from unbundled elements. For example, transport between an incumbent LEC's central office and an interconnector's network could be considered either of the foregoing. In such a case, the use of different pricing rules for the different categories may create inconsistencies in the pricing of similar services. This could create economic inefficiencies. We seek comment on whether the statute permits states to use identical pricing rules for each category and, if different rules are used for each, whether it will be possible to distinguish transport and termination from the other categories of service. We also seek comment on whether, if two different pricing rules could apply to a particular situation, we should require that the new entrant be able to choose between them.

234. We seek comment on whether we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic, and whether any such generic pricing methodology or ceiling should be established using the same principles that might be used to establish any ceiling for interconnection and unbundled elements. We invite parties to suggest any other rules we might establish to assist states. We also seek comment on whether we should mandate a floor for state pricing of reciprocal compensation. The question of whether any floors should be imposed on the charge for transport and termination of traffic is complicated by the additional questions, discussed below, of whether competing LECs should be required to charge symmetrical rates, and to what extent bill and keep arrangements may or should be used. We seek comment on these issues. We also seek comment on the meaning of section 252(d)(2)(B)(ii), which prohibits "any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls" and any requirement that carriers "maintain records with respect to the additional costs of such calls."[313] We seek comment on whether one or more of the state policies for mutual compensation for transport and termination of traffic could serve as a model for national policies. We also seek comment on state policies that the commenter believes are inconsistent with the goals of the 1996 Act or that are inadvisable from a policy perspective. Parties are also invited to comment on the possible consequences of requiring new entrants to negotiate reciprocal compensation arrangements with incumbents under ground rules that may vary widely from state to state. We also seek comment on whether provisions to maintain existing arrangements are necessary under section 251(d)(3).

### e. Symmetry

235. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to a competitor for transport and termination of traffic is the same as the rate the incumbent LEC charges the competitor for the same service. We note that incumbent LECs are not likely to need to purchase significant amounts of interconnection or unbundled elements from competitors, except for transport and termination of traffic. We therefore consider symmetrical compensation arrangements as a possible additional requirement only for transport and termination of traffic. We seek comment on whether a rate symmetry requirement is consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "a reasonable

[313] 1996 Act, sec. 101, § 252(d)(2)(B)(ii).

approximation of the additional costs of terminating such calls."[314]

236. Symmetrical compensation rates based on the incumbent LEC's rate are administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective networks. Setting asymmetric, cost-based rates might require evaluating the cost structure of nondominant carriers, which would be complex and intrusive. Symmetrical rates also could satisfy the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls," by using the incumbent LEC's costs and rates for transport and termination of traffic as a proxy for the costs incurred by new entrants. Moreover, symmetrical rates could reduce an incumbent LEC's ability to use its bargaining strength to negotiate an excessively high termination charge that competitors would pay the incumbent and an excessively low termination rate that the incumbent would pay competitors. Further complicating this issue is that a competitor may possess a degree of market power over the incumbent LEC that needs to terminate a call on the competitor's network because the decision to place the call lies with the incumbent's customer (who may or may not be aware that the call's intended recipient is on a different network). The competitor, therefore, may have an incentive and the ability to charge high rates to the incumbent for transport and termination of traffic on its network. Finally, symmetrical rates may give carriers a greater incentive to reduce their costs, because the rates they can charge for transport and termination of traffic may not be based directly on their own costs.

237. On the other hand, symmetrical interconnection rates have certain disadvantages. Different networks, even those that use similar technologies, may have different cost characteristics. If interconnection rates were fully cost-based, then instead of setting symmetric rates, one LEC might pay a competitor different interconnection rates for transport and termination than it receives from its competitor. Further, rate symmetry in some circumstances may not resolve existing bargaining power imbalances. For instance, a LEC might be able to use its bargaining power to extract a symmetrical rate higher than relevant costs, or to require that new entrants incur a disproportionate share of the costs of transporting traffic between the two carriers' central offices.

238. In establishing principles to govern state arbitration of rates for transport and termination of traffic, as well as state review of BOC statements of generally available terms and conditions, there are a number of possible options we could follow with regard to rate symmetry. First, we could allow the states to decide whether to require rate symmetry. Second, we could require the states to impose symmetrical rates. Third, we could permit states to allow new entrants to charge termination rates higher than the incumbent LEC in particular circumstances. For example, it might be appropriate to permit a new entrant that offers a premium service with higher costs to charge a higher rate to the LEC of the customer originating the call if the originating LEC can pass on the additional cost to the caller, who could be informed that the call carries an additional charge.[315] We seek comment on these options.

### f. Bill and Keep Arrangements

239. Under bill and keep arrangements, broadly construed, neither of the interconnecting networks charges the other network for terminating the traffic that originated on the other network, and hence the terminating marginal compensation rate on a usage basis is zero. Instead, each network recovers from its own end-users the cost of both originating traffic

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[314] 1996 Act, sec. 101, § 252(d)(2).

[315] See *CMRS Notice* at para. 59 n.76.

delivered to the other network and terminating traffic received from the other network. A bill and keep approach does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

240. As noted earlier, many states have established bill and keep arrangements on an interim basis until a tariffed rate can be established.[316] In other states, such as Maryland, Michigan and New York, bill and keep has not been employed and tariffed rates for the transport and termination of traffic are already in effect.[317] Michigan, however, allows carriers to waive mutual recovery and use bill and keep if traffic from one network to the other is not more than five percent greater than traffic flowing in the opposite direction.[318] In Florida, after negotiations between the incumbent and two new entrants failed, the Florida Public Service Commission determined that, for the termination of local traffic, competing LECs will compensate each other by mutual traffic exchange. Any party that believes that traffic is imbalanced to the point that it is not receiving benefits equivalent to those it is providing through this form of bill and keep arrangement may request that the compensation mechanism be changed.[319] Other states are considering approaches similar to that of Florida.[320] The Texas Public Utilities Commission has proposed a rule that would require competitive LECs to negotiate mutual compensation rates. If negotiations fail, there would be a nine-month bill and keep period to allow the Texas commission time to establish interconnection rates, terms, and conditions.[321] The Public Utilities Commission of Ohio staff has proposed using bill and keep on an interim basis for one year. While that proposal is under consideration, Ameritech and Time Warner are using bill and keep in their interim interconnection arrangement until the end of December 1997.[322]

241. Proponents of bill and keep arrangements argue that such arrangements are advantageous in many circumstances. Because no calculation of costs, nor any metering of usage, is necessary under a bill and keep regime, such arrangements may be more quickly established and easily administered. Further, some networks may lack the ability to measure the volume of exchange traffic, and adding that ability would be very costly if done outside of normal network upgrades.[323] Bill and keep arrangements are efficient if the incremental cost to each network of terminating traffic originated on the other network is zero. When the incremental costs of termination for each carrier are near zero (as may be the case for off-peak usage), bill and keep arrangements yield results similar to those of arrangements in which mutual compensation rates are set based on the incremental costs of shared network facilities. Finally, even if incremental termination costs are not zero, bill and keep may impose a small loss in economic efficiency if the demand for calls is inelastic with respect to termination charges. Demand might be inelastic either because termination charges are not passed through to

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[316] *See* Section II.C.5.b.

[317] NARUC Handbook at 74, 77, 80-81.

[318] *See* City Signal, Inc., 159 P.U.R.4th 532 (Mich. P.S.C. 1995).

[319] NARUC Handbook at 58.

[320] *See, e.g.*, NARUC Handbook at 69.

[321] NARUC Handbook at 118.

[322] *Id.* at 85-86.

[323] ALTS Handbook at 20.

customers, or, as is the case with CMRS, the termination charges are a small part of the cost of service. Bill and keep may be efficient when the efficiency loss is small and the administrative cost of termination charges is large.

242. If at least one carrier has a non-zero incremental termination cost and the elasticity of demand is significant, then bill and keep may create significant efficiency losses by not giving carriers (and their customers) the correct price signals to use network resources efficiently. If there is a positive cost to terminating a call on a competitor's network, but the originating carrier is not charged for sending the call, the originating carrier will have inefficient incentives to compete for customers that initiate large volumes of traffic but receive few calls. Similarly, if there is no charge to the consumer for placing a call that imposes a positive cost on the network of the party called, consumers are likely to initiate an excessive number of calls.

243. As noted earlier, section 252(d)(2)(B)(i) provides that the standards in section 252(d)(2)(A) restricting what may be considered "just and reasonable" terms and conditions for reciprocal compensation "shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)." Some parties contend that this section merely authorizes bill and keep arrangements in voluntary negotiated arrangements, but that the Commission and the states are prohibited from imposing bill and keep.[324] The grounds on which a state may reject a negotiated arrangement, however, are limited in Section 252(e)(2) to those that discriminate against a non-party telecommunications carrier or are inconsistent with the public interest, convenience, and necessity. Therefore, the language in 252(d)(2)(B)(i) arguably is not necessary to authorize the states to approve bill and keep in negotiated arrangements, and may be intended to authorize the states to impose bill and keep arrangements in arbitration. We seek comment on whether section 252(d)(2)(B)(i) authorizes states or the Commission to impose bill and keep arrangements. If it does, we also seek comment on whether we must or should limit the circumstances in which states may adopt bill and keep arrangements. For example, one approach would find that section 252(d)(2)(B)(i) allows states to establish bill and keep arrangements only when either of two conditions are met: (1) the transport and termination costs of both carriers are roughly symmetrical and traffic is roughly balanced in each direction during peak periods; or (2) actual transport and termination costs are so low that there is little difference between a cost-based rate and a zero rate (for example, during off-peak periods). When neither of these conditions are met, bill and keep arrangements arguably would not provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," which would violate the requirement of section 252(d)(2)(A)(i).[325] Another possible approach would be to permit or require states to adopt a variant of bill and keep, such as that used by Michigan.[326] In addition, we seek comment on the meaning of the statutory description of bill and keep arrangements as "arrangements that waive mutual recovery."[327] We seek comment on the policies that the states have adopted with respect to bill and keep arrangements. We also seek comment on the historical interconnection arrangements between neighboring incumbent LECs, which, in many cases, used a bill and keep

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[324] *See* Letter from Michael K. Kellogg to William F. Caton, February 26, 1996 at 5-6.

[325] 1996 Act, sec. 101, § 252(d)(2)(A)(i).

[326] Michigan allows carriers to waive mutual recovery and use bill and keep if traffic from one network to the other is not more than five percent greater than traffic flowing in the opposite direction.

[327] 1996 Act, sec. 101, § 252(d)(2)(B)(i).

approach with respect to compensation for transport and termination of telecommunications traffic. We also seek comment on whether one or more of these state policies could be incorporated as models for federal policy. We also seek comment on state policies that the commenter believes are inconsistent with the goals of the 1996 Act or that are inadvisable from a policy perspective.

### g. Other Possible Standards

244. There are other ways to establish rate levels or ceilings for reciprocal compensation for transport and termination of traffic, including, *inter alia*, basing them on existing arrangements between neighboring incumbent LECs or measured local service rates (which provides a quick method for determining an appropriate ceiling), or establishing a presumptive uniform per-minute interconnection rate. We solicit comment on whether any of these or other alternatives should be used as the principle for pricing transport and termination of traffic between LECs, and how they would be applied.[328] We also seek comment on whether it might be desirable to establish an interim rule (such as bill and keep) to apply during a limited initial period while negotiations or arbitration proceedings are ongoing, and a different rule for states to use if called upon to establish long-term arbitrated rates. This could permit new competitors to enter the market more quickly, equalize bargaining power between new entrants and incumbent LECs, and reduce the incumbent's incentive to stall negotiations.

## D. Duties Imposed on "Telecommunications Carriers" by Section 251(a)

245. We first need to identify the entities that qualify as "telecommunications carriers" under section 251. A "telecommunications carrier" is defined in section 3(44) as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[329] Section 3(44) further provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage."[330]

246. We believe this definition, by itself, generally includes local, interexchange, and international services. We therefore tentatively conclude that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We seek comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.[331] For example, how does the

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[328] *See CMRS Notice* at paras. 58-80.

[329] 1996 Act, sec. 3, § 3(44). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 1996 Act, sec. 3, § 3(46).

[330] 1996 Act, sec. 3, § 3(44).

[331] We note that our decision regarding which service providers are deemed "telecommunications carriers" may determine whether that provider is obligated to contribute to universal service support mechanisms, in accordance with section 254. *See Universal Service Notice of Proposed Rulemaking*, para. 119 (seeking comment on which service providers are "telecommunications carriers").

provision of an information service, as defined by section 3(a)(41),[332] in addition to an unrelated telecommunications service, affect the status of a carrier as a "telecommunications carrier" for purposes of section 251?[333]

247. With respect to the regulatory classification of the provision of fixed or mobile satellite service, we already have determined that earth station and space station licensees providing domestic and international fixed-satellite telecommunications services may offer service on a non-common carrier basis, if they choose. We have determined that earth station operators could elect whether to operate as common carriers or private carriers.[334] More recently, we extended this policy to domestic fixed-satellite (domsat) space station licensees. Previously, we required domsat licensees to operate as common carriers unless the licensee applied for, and was granted, authority to sell transponders on a non-common carrier basis.[335] In amending this policy, we noted that no transponder sales request has been opposed in the last decade. We also noted that despite the routine approval of these sales requests, several operators have chosen to continue to offer space segment capacity on a common carrier basis. This suggests that market forces are sufficient to provide enough common carrier capacity for domestic satellite telecommunications services. We also stated that separate satellite systems providing international fixed-satellite services were established to operate on a non-common carrier basis. and, thus, were never regulated as common carriers.[336] This policy gives fixed-satellite service operators flexibility to meet their customers' changing needs without unnecessary regulatory delay and allows them to remain competitive in the marketplace. With respect to fixed-satellite capacity offered to CMRS providers, we stated that we will examine an array of public interest factors in deciding whether such an offering should be treated as common carriage consistent with section 332(c)(5).[337] With respect to the mobile-satellite service, we already have determined that we would allow space station licensees operating in certain services to choose

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[332] The statute defines information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [which] includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 1996 Act, sec. 3, § 3(20).

[333] We note that under the *Computer III* and *Open Network Architecture* proceedings, the Commission imposed a regulatory structure on the BOCs, GTE, and AT&T for their provision of enhanced services that requires unbundling of basic service features, comparably efficient interconnection, and other nonstructural safeguards. *See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995), *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988), *recon.*, 5 FCC Rcd 3084 (1990); 5 FCC Rcd 3103 (1990), *erratum*, 5 FCC Rcd 4045, *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.*, 8 FCC Rcd 97 (1993); 6 FCC Rcd 7646 (1991); 8 FCC Rcd 2606 (1993), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

[334] *See* FCC Form 493 (Application for Earth Station Authorization).

[335] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238 (1982), *aff'd sub nom. World Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

[336] *Separate Satellite Systems*, 101 F.C.C.2d 1046, 1103 (1985).

[337] *CMRS Second Report and Order*, paras. 106-108.

whether to offer space segment capacity on a common carrier or non-common carrier basis.[338] We tentatively conclude that we should continue to determine whether the provision of mobile satellite services is CMRS (and therefore common carriage) or Private Mobile Radio Service based on the factors set forth in the *CMRS Second Report and Order*.[339] We also seek comment on whether, and in what respects, this definition of "telecommunications carrier" differs from the definition of "common carrier."[340]

248. Section 251(a)(1) imposes a duty to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[341] We seek comment on the meaning of "directly or indirectly" in the context of section 251(a)(1), as well as any other issues raised by this subsection. In this context, we ask commenters to address whether section 251(a) is correctly interpreted to allow non-incumbent LECs receiving an interconnection request from another carrier to connect directly or indirectly at its discretion. Section 251(a)(2) of the 1996 Act imposes a duty on each telecommunications carrier "not to install network features, functions or capabilities that do not comply with the guidelines or standards established pursuant to section 255 or 256."[342] We ask commenters to address how this provision should be applied to incumbent and non-incumbent LECs.

249. Section 255 requires the development of guidelines to ensure that telecommunications equipment and customer premises equipment is accessible by persons with disabilities. Section 256 requires the Commission to coordinate "network planning among telecommunications carriers and other providers of telecommunications services for the efficient interconnection of public telecommunications networks."[343] While the specific guidelines or standards to be adopted pursuant to section 255 and 256 will be addressed in one or more separate proceedings, we request comment here on what action, if any, the Commission should

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[338] *See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, 9 FCC Rcd 5936 (1994) (*Big LEO Order*).

[339] *CMRS Second Report and Order*, para. 108

[340] 1996 Act, sec. 3, § 3(10).

[341] 1996 Act, sec. 101, § 251(a)(1).

[342] 1996 Act, sec. 101, § 251(a)(2). Subsections 255(b) and (c) require all manufacturers of telecommunications equipment and customer premises equipment (CPE), and all providers of telecommunications services, to ensure that their "equipment, CPE and services are accessible to and usable by individuals with disabilities, if readily achievable." Section 255(d) provides that, if the requirements of subsections (b) or (c) are not readily achievable, the manufacturer or provider must "ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable." Section 255(e) provides that, within eighteen months after the date of enactment, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and CPE, in conjunction with the Commission, and that the Board shall review and update the guidelines periodically. Finally, Section 256 requires "coordinated network planning" to ensure "public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service." 1996 Act, sec. 101, § 256(a)(1)(A)-(B). Section 256 also authorizes the Commission to participate in the development of network interconnectivity standards "that promote access to . . . network capabilities and services by individuals with disabilities." 1996 Act, sec. 101, § 256(b)(2)(B).

[343] 1996 Act, sec. 101, § 256(b)(1).

take to ensure compliance with the obligations established in section 251(a)(2), which directs telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines or standards established pursuant to section 255 or 256." What steps, if any, should the Commission take to make carriers aware of the standards adopted pursuant to sections 255 and 256, and of the periodic revisions to these standards?[344] How should the phrase "network features, functions or capabilities" be defined, and what is meant by "installing" such network features?

## E. Number Administration

### 1. Selection of a neutral number administrator

250. Section 251(e)(1) of the Act requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[345] It further gives the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States," but states that "[n]othing in this paragraph shall preclude the Commission from delegating to state commissions or other entities all or any portion of such jurisdiction."[346]

251. Additionally, pursuant to the competitive checklist contained in section 271(c)(2)(B), BOCs desiring to provide in-region interLATA telecommunications services must afford, "[u]ntil the date by which telecommunications numbering administration guidelines, plans or rules are established, non-discriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers . . . [and] [a]fter that date, [must] compl[y] with such guidelines, plan or rules."[347] These measures foster competition by ensuring telecommunications numbering resources are administered in a fair, efficient, and orderly manner.

252. The Commission has already taken action to designate an impartial number administrator in its North American Numbering Plan (NANP) decision.[348] In the *NANP Order*, the Commission concluded that the functions associated with NANP administration would be transferred to a new administrator of the NANP, unaligned with any particular segment of the telecommunications industry.[349] We tentatively conclude that the *NANP Order* satisfies the requirement of section 251(e)(1) that the Commission designate an impartial number administrator. We seek comment on this tentative conclusion.

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[344] 1996 Act, sec. 101, § 255(e).

[345] 1996 Act, sec. 101, § 251(e)(1).

[346] 1996 Act, sec. 101, § 251(e)(1).

[347] 1996 Act, sec. 151, § 271(c)(2)(B)(ix).

[348] *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, FCC 95-283 (rel. July 13, 1995) (*NANP Order*) (*recon. pending*). The *NANP Order* was initiated in response to Bellcore's stated desire to relinquish its role as NANP administrator. *See* Letter from G. Heilmeier, President and CEO, Bellcore to the Commission (Aug. 19, 1993). Bellcore, however, will continue performing its NANP Administration functions until those functions are transferred to a new NANP administrator pursuant to the *NANP Order*.

[349] *Id.*, para. 57.

253. Toll free telephone numbers are not administered by the North American Numbering Plan administrator. Database Service Management, Inc. (DSMI), which is a subsidiary of Bellcore, administers toll free numbers.[350] In its proceeding addressing toll free telephone numbers, the Commission sought comment on whether DSMI should continue to administer toll free numbers, or whether the NANP administrator or another neutral entity should administer toll free numbers.[351] We will address the issue of toll free number administration in the Commission's *Toll Free* proceeding.

### 2. State role in numbering administration

254. Section 251(e)(1) allows the Commission to delegate any portion of its jurisdiction over numbering administration to the states. We tentatively conclude that the Commission should retain its authority to set policy with respect to all facets of numbering administration, including area code relief issues in order to ensure the creation of a nationwide, uniform system of numbering that is essential to the efficient delivery of interstate and international telecommunications services and to the development of the robustly competitive telecommunications services market. Prior to the enactment of the Act, state commissions implemented new area codes by adopting area code relief plans, subject to the guidelines enumerated by the Commission in its *Ameritech Order*.[352]

255. Area code relief traditionally has come in the form of an area code split,[353] but can also take the form of an area code overlay.[354] In the *Ameritech Order*, the Commission concluded that Ameritech's proposed wireless-only overlay plan would be unreasonably discriminatory and anticompetitive and that administration of numbers: (1) must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications services providers; (2) should not unduly favor or disadvantage any particular industry segment or group of consumers; and (3) should not unduly favor one technology over another.[355]

256. In that decision, the Commission also sought to clarify the authority of the Commission and the states respectively with respect to numbering administration. While the Commission held that it had broad authority over telephone numbering issues, the Commission overturned as *dicta* prior statements it had made suggesting that we retained

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[350] DSMI subcontracts functions requiring access to proprietary information to a neutral third party, Lockheed IMS.

[351] *See Toll Free Service Access Codes*, CC Docket 95-155, Notice of Proposed Rulemaking, FCC 95-419 (rel. Oct. 5, 1995) (*Toll-Free NPRM*), para. 49.

[352] *See Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995) (*Ameritech Order*) (*recon. pending*).

[353] An area code split occurs when an existing geographic area code is split into two parts and roughly half of the telephone customers continue to be served through the existing area code and half receive a new area code.

[354] An overlay area code covers the same geographic area as an existing area code or area codes, and allows telephone customers in that area to be served through either code.

[355] *Ameritech Order* at 4604

plenary jurisdiction over numbering issues.[356] The Commission acknowledged that state commissions have legitimate interests in the administration of numbering; it also noted that the state commissions are uniquely positioned to understand, judge and determine how new area codes can best be implemented in view of local circumstances.[357] We believe this continues to be the case. We thus tentatively conclude that the Commission should delegate matters involving the implementation of new area codes, such as the determination of area code boundaries, to the state commissions so long as they act consistently with our numbering administration guidelines. We also tentatively conclude that the *Ameritech Order* should continue to provide guidance to the states regarding how new area codes can be lawfully implemented. We seek comment on these tentative conclusions.

257. Nevertheless, we emphasize that any uncertainty about the Commission's and the states' jurisdiction over numbering administration that may have existed prior to the enactment of the 1996 Act has now been eliminated. Section 251(e)(1) of the Act vests in the Commission exclusive jurisdiction over numbering matters in the United States and authorizes the Commission to delegate some or all of that power to state commissions. As indicated above, we propose leaving to the states decisions related to the implementation of new area codes subject to the guidelines enumerated in the *Ameritech Order*. We are concerned, however, that situations may arise where a state commission, in implementing area code relief, appears to be acting in violation of those guidelines.[358] We therefore seek comment on whether the Commission should, in light of this concern and the enactment of section 251(e)(1), reassess the jurisdictional balance between the Commission and the states that was crafted in the *Ameritech Order*. We also seek comment on what action this Commission should take when a state appears to be acting inconsistently with our numbering administration guidelines. In this regard, we note that issues related to area code relief plans often require prompt resolution due to the imminent exhaustion of central office codes in the area code at issue.

258. Prior to enactment of the 1996 Act, Bellcore, as the NANP Administrator, the LECs, as central office code administrators, and the states performed the majority of functions related to the administration of numbers.[359] We tentatively conclude that the Commission should delegate to Bellcore, the LECs, and the states the authority to continue performing each of their functions related to the administration of numbers as they existed prior to enactment of the 1996 Act until such functions are transferred to the new NANP administrator pursuant to the *NANP Order*. We seek comment on this tentative conclusion. We also seek comment on whether the Commission should delegate any additional number administration functions to the states or to other entities.

### 3. Cost related to number administration

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[356] *Id.* at 4600, fn. 18.

[357] *Id.* at 4601.

[358] *See, e.g.* Letter from Geraldine A. Matise, Chief, Network Services Division, Common Carrier Bureau, FCC to Ronald R. Conners, Director, North American Numbering Plan Administration (April 11, 1996). The Texas Public Utilities Commission had directed Southwestern Bell Telephone to request area code assignments from the North American Numbering Plan Administration (NANPA) for use as wireless-only area code overlays in Dallas and Houston. In its letter to NANPA, the Commission agreed with NANPA's decision not to make these area code assignments.

[359] For a discussion of NANP administration functions, see *NANP Order* at paras. 11-12.

259. In section 251(e)(2) of the 1996 Act, Congress mandates that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[360] In the *NANP Order*, the Commission: (1) directed that the costs of the new impartial numbering administrator be recovered through contributions by all communications providers; (2) concluded that the gross revenues of each communications provider will be used to compute each provider's contribution to the new numbering administrator; and (3) concluded that the NANC will address the details concerning recovery of the NANP administrator costs.[361] We find that we need take no further action in this NPRM because the Commission has already determined that cost recovery for numbering administration arrangements must be borne by all telecommunications carriers on a competitively neutral basis.

## F. Exemptions, Suspensions, and Modifications

260. Section 251(f)(1)(A) provides that the obligations imposed on incumbent LECs pursuant to section 251(c) "shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."[362] Section 251(f)(1)(B) sets forth procedures for the state commission to terminate the rural telephone company exemption.[363] Section 251(f)(2) provides that a LEC "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition."[364] The state must grant the petition to the extent that, and for such duration as, the state commission determines that such suspension or modification is necessary and is consistent with the public interest, convenience and necessity.[365] Section 251(f)(2) provides for relief from the requirements of both Section 251(b) and (c), whereas section 251(f)(1)(A) provides for relief only from the requirements of section 251(c).[366]

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[360] 1996 Act, sec. 101, § 251(e)(2).

[361] *NANP Order*, paras. 94 & 99.

[362] 1996 Act, sec. 101, § 251(f)(1)(A). This exemption does not apply with respect to a request under Section 252(c) from a cable company seeking to provide telephone service in an area in which the rural telephone company provides video service, unless the rural telephone company was providing video service as of the date of enactment of the 1996 Act. 1996 Act, sec. 101, § 251(f)(1)(C).

[363] 1996 Act, sec. 101, § 251(f)(1)(B).

[364] 1996 Act, sec. 101, §251(f)(2).

[365] 1996 Act, sec. 101, § 251(f)(2). The state must determine that such modification or suspension is necessary to avoid (1) a significant adverse economic impact on users of telecommunications services generally; (2) imposing a burden that is unduly economically burdensome; or (3) imposing a requirement that is technically infeasible.

[366] As discussed above, section 251(b) sets forth obligations for all LECs, and section 251(c) sets forth obligations for incumbent LECs.

261. We seek comment on whether the Commission can and should establish some standards that would assist the states in satisfying their obligations under this section. For example, should the Commission establish standards regarding what would constitute a "bona fide" request? We tentatively conclude that the states alone have authority to make determinations under section 271(f).

### G. Continued Enforcement of Exchange Access and Interconnection Regulations

262. Section 251(g) provides that each LEC, "to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" that applied to such carrier immediately preceding the date of enactment of the 1996 Act, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission . . . ."[367] Those obligations and restrictions are enforceable until they are superseded. Section 251(i) states that nothing in section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201."[368] We seek comment on any issues that these provisions may create. In particular, we seek comment on any aspect of this Notice that may affect existing "equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)."[369]

### H. Advanced Telecommunications Capabilities

263. Finally, we note that pursuant to subsection 706(a) of the 1996 Act the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures to promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." We sought comment on subsection 706(a) in our section 254 Universal Service NPRM, in our Open Video Systems NPRM, and in our Cable Reform NPRM. Because section 251 and this NPRM comprehensively address "measures to promote competition in the local telecommunications market," we believe it relevant to also seek comment herein on how we can advance Congress's subsection 706(a) goal within the context of our implementation of sections 251 and 252 of the 1996 Act.

## III. PROVISIONS OF SECTION 252

### A. Arbitration Process

264. Section 252(a) states that, "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of

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[367] 1996 Act, sec. 101, § 251(g).

[368] 1996 Act, sec. 101, § 251(i).

[369] 1996 Act, sec. 101, § 251(g).

section 251."[370] Any party negotiating an agreement under section 252(a) "may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation."[371] Section 252(b) states that, "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition the State commission to arbitrate any open issues."[372] In addition, under section 252(e), the parties must submit for approval any negotiated or arbitrated agreement to the state commission.[373]

265. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under that section.[374] We note that, unlike section 251(d)(1), there is no specified time within which the Commission must establish regulations pursuant to section 252(e)(5). Thus, we seek comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). We also seek comment on what constitutes notice of failure to act, and what procedures, if any, we should establish for interested parties to notify the FCC that a state commission has failed to act.

266. We seek comment on the circumstances under which a state commission should be deemed to have "fail[ed] to act" under section 252(e)(5). We note that section 252(e)(4) states that if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be "deemed approved."[375] We seek comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). Other questions raised by section 252(e)(5) include: (1) if the Commission assumes the responsibility of the state commission, is the Commission bound by all of the laws and standards that would have applied to the state commission; and (2) is the Commission authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3)? One possible interpretation is that, if an agreement is deemed approved pursuant to section 252(e)(4), it will be deemed to comply with state law, and the Commission will have no authority to review that determination.

267. Once the Commission assumes such responsibility under section 252(e)(5), there is no specific provision by which authority reverts back to the state commission. For example, if the Commission arbitrates an agreement pursuant to section 252(e)(5), the 1996 Act does not provide that the arbitrated agreement is referred back to the state commission for any further purpose. We seek comment on whether, once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction over that matter or proceeding.

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[370] 1996 Act, sec. 101, § 252(a).

[371] 1996 Act, sec. 101, § 252(a)(2).

[372] 1996 Act, sec. 101, § 252(b).

[373] 1996 Act, sec. 101, § 252(e)(1).

[374] 1996 Act, sec. 101, § 252(e)(5). Before doing so, section 252(e)(5) requires the Commission to issue an order preempting the state's jurisdiction of that proceeding or matter.

[375] 1996 Act, sec. 101, § 252(e)(4).

268. We also seek comment on whether we should adopt in this proceeding some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). One method we could adopt is "final offer" arbitration, whereby each party to the negotiation proposes its best and final offer, and the arbitrator determines which of the two proposals becomes binding. Under final offer arbitration, each party has incentives to propose an arrangement that the arbitrator could determine to be fair and equitable. In addition, parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator. While final offer arbitration is a simple and speedy option, it is possible that the proposals submitted by the parties may not be consistent with the public interest and policies of sections 251 and 252. Alternatively, we could adopt an open-ended arbitration method, which would culminate in a final decision that would be consistent with the public interest and policies of sections 251 and 252. Open-ended arbitration, however, is more administratively difficult and likely to be slower than final offer arbitration.

## B. Section 252(i)

269. Section 251 requires that interconnection, unbundled element, and collocation rates be "nondiscriminatory" and prohibits the imposition of "discriminatory conditions" on the resale of telecommunications services.[376] Section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251. Section 252(i) of the 1996 Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[377] We note that in its March 23, 1995 Report on S.652, the Senate Committee on Commerce, Science and Transportation discusses an earlier version of section 252(i) and states that the Committee "intends this requirement to help prevent discrimination among carriers."[378]

270. We seek comment on whether in this proceeding we should adopt standards for resolving disputes under section 252(i) in the event that we must assume the state's responsibilities pursuant to section 252(e)(5). Because the Commission may need to interpret section 252(i) if it assumes the state commission's responsibilities, we seek comment on the meaning of that provision. Must interconnection, services, or network elements provided under a state-approved section 252 agreement be made available to any requesting telecommunications carrier, or would it be consistent with the language and intent of the law to limit this requirement to similarly situated carriers? If the obligation were construed to

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[376] 1996 Act, sec. 101, § 251(c)(2)(D) (interconnection rates, terms, and conditions); 251(c)(3) (unbundled network elements rates, terms, and conditions); 251(c)(6) (collocation rates, terms, and conditions); and 251(c)(4)(B) (resale). Section 252(d)(1) also requires nondiscriminatory interconnection and network element charges. 1996 Act, sec. 101, § 252(d)(1).

[377] 1996 Act, sec. 101, § 252(i).

[378] *See* S. Rep. No. 104-23, 104th Cong., 1st Sess. 21-22 (1995) (1995 Senate Report). The Senate originally drafted the section entitled "Availability to Other Telecommunications Carriers," which was to become section 252(i), to read: "A local exchange carrier shall make available any service, facility, or function provided under an interconnection agreement to which it is a party to any other telecommunications carrier that requests such interconnection upon the same terms and conditions as those provided in the agreement." *See* S. 652, 104th Cong., 1st Sess. § 251(g) (1995).

extend only to similarly situated carriers, how should similarly situated carriers be defined? For example, does the section require that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or would it be consistent with the statute to permit different rates if the costs of serving carriers are different? In addition, can section 252(i) be interpreted to allow LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement? We tentatively conclude that the language of the statute appears to preclude such differential treatment among carriers. We seek comment on this tentative conclusion.

271. We note that negotiated agreements under section 252(a) are the product of compromise between incumbent LECs and requesting carriers, and may therefore contain provisions to which a party agreed as specific consideration for some other provision. We seek comment on whether section 252(i) requires requesting carriers to take service subject to all of the same terms and conditions contained in the entire state-approved agreement.[379] Alternatively, does section 252(i) permit the separation of section 251(b) and (c) agreements down to the level of the individual provisions of subsections (b) and (c) and the individual paragraphs of section 251?[380] We recognize that allowing requesting carriers to unbundle too extensively the provisions of a voluntarily negotiated agreement might affect the negotiation process by intensifying the importance each individual term of the agreement. We note that in its March 23, 1995 Report on S. 652, the Senate Committee on Commerce, Science, and Transportation stated that it intended the requirement codified in section 252(i) to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated,"[381] and seek comment on its meaning.

272. Section 252(i) requires that incumbent LECs must make available the interconnection, service, or network element provided under the agreement after state approval of the agreement. The statute is silent, however, as to how long such an agreement must be made available. We seek comment on whether the agreement should be made available for an unlimited period, or whether the statute would permit the terms of the agreement to be available for a limited period of time. In particular, we ask commenters to cite any statutory language that would require the resubmission of these pre-existing interconnection agreements to state agencies.

## IV. PROCEDURAL ISSUES

### A. *Ex Parte* Presentations

273. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are

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[379] Ameritech suggests that LECs should only be obligated to make available such interconnection, service, or network element provided under a state-approved agreement subject to all applicable terms and conditions contained in the entire agreement. Ameritech "Proposed Interpretation of Section 252 Pricing Standards" (submitted with its March 25, 1996 letter to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission) at 13-14.

[380] This view has been proposed by the Association for Local Telecommunications Services. *See* ALTS Handbook at 23-24.

[381] 1995 Senate Report at 21-22.

disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206. Written submissions, however, will be limited as discussed below.[382]

## B. Regulatory Flexibility Analysis

274. Section 251 of the Communications Act establishes a variety of interconnection obligations. Some of these requirements apply to all telecommunications carriers (which include incumbent LECs, new LEC entrants, and interexchange carriers).[383] Other requirements apply to LECs -- both incumbents and new entrants.[384] Section 252 also places certain obligations on state regulatory commissions.

275. We believe that the Regulatory Flexibility Act applies differently to these groups. In particular, we believe that the Regulatory Flexibility Act is inapplicable to this proceeding insofar as it pertains to incumbent LECs. The proposal in this proceeding, however, may have a significant economic impact on a substantial number of small businesses as defined by section 601(3) of the Regulatory Flexibility Act insofar as they apply to telecommunications carriers other than incumbent LECs.

276. Accordingly, we certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding insofar as it pertains to incumbent LECs and state utility commissions because the relevant proposals, if promulgated, would not have a significant economic impact on a substantial number of small entities, as defined by section 601(3) of the Regulatory Flexibility Act. Incumbent LECs directly subject to the proposed rule amendments do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller incumbent LECs are carefully considered in resolving those issues. To the extent that this Notice may apply to state utility commissions, they do not qualify as small entities under section 601 of the Regulatory Flexibility Act.

277. Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant economic effect on a substantial number of small entities. Accordingly, we are preparing an Initial Regulatory Flexibility analysis with respect to the provisions applicable to telecommunications carriers other than incumbent LECs. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Notice of Proposed Rulemaking is as follows:

278. *Reason for Action*: The Commission is issuing this Notice of Proposed Rulemaking to implement the local exchange competition provisions of the 1996 Act discussed above, most importantly section 251.

279. *Objectives*: The objective of the Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues addressed in the Notice.

280. *Legal basis*: The Notice of Proposed Rulemaking is adopted pursuant to

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[382] *See infra* ¶ 291.

[383] 1996 Act, sec. 101, § 251(a); 1996 Act, sec. 3, § 3(44).

[384] 1996 Act, sec. 101, § 251(b); 1996 Act, sec. 3, § 3(26).

Sections
1, 4, 201-205, 222, 224, 225, 251, 252, 253, 254, 255, 256, 271, and 273 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153, 154, 201-205, 222, 224, 251, 252, 253, 254, 255, 256, 271, and 273.

281. *Description of small entities affected*: Certain of the proposals in this Notice would apply to telecommunications carriers, other than incumbent LECs. These carriers would include small interexchange carriers and small, new LEC entrants. Some of these carriers clearly qualify as small business entities.

282. *Potential Impact*: Some of the proposals in this Notice may impose requirements that will have a significant economic effect on certain small business entities. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth findings in the Final Regulatory Flexibility Analysis.

283. *Reporting, recordkeeping and other compliance requirement:* The proposed rules, adopted pursuant to the Telecommunications Act of 1996, would require dominant incumbent local exchange carriers, in certain cases, to submit documentation requested by state commissions for arbitration concerning the rates, terms, and conditions for interconnection and network element unbundling.

284. *Federal rules that may overlap, duplicate or conflict with the Commission's proposal:* Our existing Expanded Interconnection rules may overlap with the requirements of section 251 addressed in this Notice. We have also sought comment on the relationship between our Part 69 Access Charge rules and the requirements of sections 251 and 252 of the 1996 Act.[385]

285. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*: The Notice of Proposed Rulemaking solicits comments on alternatives.

286. *Comments are solicited*: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rulemaking but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis.

287. The Secretary shall send a copy of this *Notice of Proposed Rulemaking*, including the certification set out above, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et. seq.* (1981).

## C. Initial Paperwork Reduction Act of 1995 Analysis

288. This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other

[385] See paras. 159-165.

comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

## D. Comment Filing Procedures

289. *General.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 25 days after public release of the item, and reply comments on or before 14 days after the comment due date. To file formally in this proceeding, you must file an original and twelve copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and 16 copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

290. *Separate Comment Filing Procedures for Dialing Parity, Number Administration, Public Notice of Technical Changes, and Access to Rights of Way.* Interested parties are instructed to file separate comments with respect to (1) dialing parity, (2) access to rights-of-way, (3) number administration, and (4) public notice of technical changes requirements and regulatory changes proposed or discussed above. Comments on these issues are to be filed on or before 27 days after public release of the item; and reply comments on, or before, 14 days after the comment due date for these four sections. These filings will not be considered in applying the page limits for filings in this proceeding. To file formal comments addressing these issues, parties are required to comply with all of the remaining comment filing procedures contained in part VI(D) of this Notice. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with 3 copies to Gloria Shambley of the Network Services Division, Common Carrier Bureau, 2000 M Street, N.W., Suite 210, Washington, D.C. 20554.

291. *Other requirements.* In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than seventy-five (75) pages and reply comments be no longer than thirty-five (35) pages, including exhibits, appendices, and affidavits of expert witnesses. Empirical economic studies and copies of relevant state orders will not be counted against these page limits. These page limits will not be waived and will be strictly enforced. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable

sections of the Commissions rules.[386] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments also must clearly identify the specific portion of this Notice of Proposed Rulemaking to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the outline of this Notice, such comments must be included in a clearly labelled section at the beginning or end of the filing. Parties may not file more than a total of ten (10) pages of *ex parte* submissions, excluding cover letters. This 10 page limit does not include: (1) written *ex parte* filings made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written material filed in response to direct requests from Commission staff. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

292. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

293. Written comments by the public on the proposed and/or modified information collections are due 25 days after public release of this NPRM, and reply comments must be submitted not later than 14 days after the comments. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

## E. Ordering Clauses

294. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4, 201-205, 222, 224, 225, 251, 252, 254, 255, 256, 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153, 154, 201-205, 222, 224, 251, 252, 254, 255, 256, and 271, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

295. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.* (1981).

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[386] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, although a summary that does not exceed three pages will not count towards the 75 page limit for comments or the 35 page limit for reply comments. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *See* 47 C.F.R. § 1.49.

296. The *Administration of the North American Numbering Plan*, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994), to the extent that it addressed the issue of dialing parity, is hereby dismissed as moot solely with respect to that issue.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary